

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL J. BRODHEIM,

Plaintiff,

No. 2:02-cv-0573 FCD KJN P

vs.

MICHAEL CRY, et al.,

Defendants.

ORDER

On May 18, 2010, this court directed the parties to file separate status reports following the remand of this case by the Ninth Circuit Court of Appeals in Brodheim v. Cry, 584 F.3d 1262 (9th Cir. 2009). The Ninth Circuit reversed the September 25, 2007 decision of the District Court which had granted summary judgment to defendants on plaintiff's retaliation claim. The Ninth Circuit found that plaintiff's retaliation claim was not barred on res judicata grounds and that plaintiff had produced sufficient evidence to create a genuine issue of material fact as to each of the required elements of the claim. The Ninth Circuit also reinstated plaintiff's state law claims. Accordingly, the action proceeds against defendants Michael Cry, Ana Ramirez Palmer, and J. Valdez.

In their status report, defendants assert that this action should ultimately be dismissed as moot because plaintiff seeks only equitable relief against defendants in their official

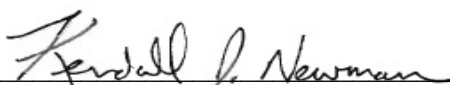
1 capacity, each defendant has now retired, and plaintiff is unable to demonstrate a continuation of  
2 the alleged unconstitutional conduct by defendants' successors. In response to plaintiff's stated  
3 intent to "seek leave to file an amended complaint, which will state no new causes of action" but  
4 "will add a request for attorney's fees and statutory damages under the Bane Civil Rights Act,"  
5 defendants assert that the Eleventh Amendment bars any claim for damages against defendants in  
6 their official capacities. Further, defendants assert that plaintiff's state tort claims, which they  
7 characterize as stated "in the alternative," are barred by plaintiff's failure to comply with the  
8 California Tort Claims Act.

9 The operative complaint, the Third Amended Complaint, was filed September 22,  
10 2004, and includes a supplemental document. (Dkt. No. 54.) The court must resolve whether  
11 plaintiff should be granted leave to file a further amended complaint before scheduling the  
12 remainder of this action.

13 Accordingly, plaintiff shall, on or before July 2, 2010, file and serve a fully-  
14 briefed request for leave to file a Fourth Amended Complaint, along with the proposed Fourth  
15 Amended Complaint. Defendants shall file and serve a response within fourteen days after  
16 service of the request. Plaintiff may file and serve a reply within seven days after service of  
17 defendants' response. Upon review of this briefing, the court will determine whether to schedule  
18 a hearing on this matter before rendering a decision.

19 SO ORDERED.

20 DATED: June 8, 2010

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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